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JOHN MARSHALL, SOUTHERN FEDERALIST.

THE recent celebration throughout the country of the one hundredth anniversary of John Marshall's induction into the office of Chief Justice of the Supreme Court has directed fresh attention to the career of a statesman whose impress on our national history is only surpassed in its importance by that of George Washington himself. It was Marshall, indeed, who took up the work laid down by Washington, and, by a long series of masterly decisions, converted the American constitution into a living instrument for carrying out those far-reaching conceptions of federal government which had been thrust upon most thinking men during the critical period of our early existence. By a strange coincidence it was a third Virginian, Thomas Jefferson, whose elevation to the presidency, March 4, 1801, was the signal for a vigorous onslaught upon many of the cherished ideals of the early federalists. And to the questions provoked by the fierce party struggle of 1800, and debated for many years thereafter, may in large measure be ascribed most of those cases relating to the interpretation of the constitution with which will forever be associated the name of Marshall. It would be a grave mistake, however, to remember this good and noble man only as the jurist who for more than a third of a century expounded from the bench the written instrument the people of a new republic had adopted as their fundamental law. Twenty-six years before his appointment by President John Adams, January 20, 1801,[1] to the post he adorned for

[1] The honor of having first suggested the observance of "John Marshall Day," February 4, 1901, is to be ascribed to Adolph Moses, Esq., of the Chicago Bar, and editor of the *Corporation Reporter*.

so long a period of time, he began the career which closed only with his death at the advanced age of eighty years. It was this long preparation as soldier, lawyer, statesman, and diplomat—a preparation involving experiences rarely encountered by public men nowadays—that so eminently fitted his mind for the task confronting it when, at the age of forty-five, he came to the new city of Washington to begin his work as Chief Justice. Other men there may have been whom President Adams might just as well have chosen, but the more one reflects on John Marshall's career the more persuaded does one become of the wisdom of the selection then made; for Marshall was a man with a mission. That he realized this fact to the utmost extent, and devoted his massive faculties to the faithful discharge of all the duties such a mission involved, is a truth stamped upon every page of his biography.

John Marshall, son of Thomas and Mary Marshall, was born in the village of Germantown,[1] Fauquier County, Va., September 24, 1755. He was the eldest of fifteen children, and passed the early years of his life at Oak Hill, the home built by his father, a man of strong intellect, a lover of books, and to whom Marshall always attributed his fondness for learning. To the influence of his mother, whose maiden name was Mary Randolph Keith, daughter of Rev. James Keith, an Episcopal clergyman of Tuckahoe, on James River, Marshall was indebted for that deep religious nature which was so prominent a feature of his character. The early environment of the lad was highly favorable to his physical and moral development, but the sparsely populated community where he passed his boyhood days can scarcely be said to have been conducive to intellectual vigor. Fauquier County, a century and a half ago, was situated in a remote section of the country. Lying in the Blue Ridge region of Northern Virginia, its picturesque hills and valleys

[1] Germantown, Marshall's birthplace, is now called Midland. It is a station on the Virginia Midland (now Southern) Railway, not far from Manassas.

were inhabited by a sturdy, independent, industrious folk. At the same time "The Hollow,"[1] as the section in which young Marshall lived was called, contained no schools, its roads were bad, no newspapers were published in the neighborhood, and the social conditions were altogether different from those prevailing in the fashionable, opulent, planter communities of the tidewater section of the province. But what if the isolation of the people was such that the gentle sex employed thorns to serve as pins, and balm tea and mush were considered delicacies in the average home? Were not these facts well calculated to foster a true American spirit, and to prevent the spread of many of those traditions which Jefferson found so unfavorable to the growth of his own portion of the State? The environment of Marshall, the lad, was therefore calculated to mold him into a man of rare gentleness and sincerity and strength—a man, indeed, in whose tall person, genial face, and freedom from ostentation were incarnated the principles of American democracy. To marry law and freedom was the work of his life.

The early training he received for his life's work was of the most meager description from the ordinary view of education, and strangely out of proportion to the magnitude of his subsequent achievements.[2] His father, as has already been intimated, was his first teacher. He knew how to impart to his son a taste for literature, a fondness for poetry and romance which Marshall retained until his end. Indeed, we are told that by the time the boy had reached his twelfth year he had copied all of Pope's "Essay on Man," and committed to memory many of that author's productions. At fourteen we find him a student at an academy in Westmoreland County, where Washington had been a pupil. With Marshall there was studying another boy with a great future before him, James Monroe, founder of our foreign policy. Unlike the youth of the dominant aristocracy, Marshall did not go to college, but after a short sojourn in

[1] Judge Aldrich, Boston *Herald*, February 5, 1901.
[2] Richard Olney, Ibid.

Westmoreland his education was supplemented by a Scotch teacher, who taught him Latin. At the age of eighteen his education, such as it was, had been completed so far as books were concerned, and the young man began seriously to look to the future. That he should study law was the most natural thing in the world. It was the age of lawyers. In England Blackstone was publishing his celebrated lectures, and on both sides of the Atlantic the profession had been liberalized vastly. Even in New England the legal profession was destroying the ascendency so long maintained by the clergy, whilst the augmenting warmth of the dispute between the colonies and Parliament had everywhere given an impetus to the investigation of constitutional questions. In the South, moreover, the law at that time, and for a number of subsequent years, offered almost the only opportunity to the young man of ambition, especially if he looked forward to a political career. True to the spirit of the age, and no less true to the promptings of an instinct rarely wrong, John Marshall turned naturally to the law. Born lawyer that he was, however, he had scarcely opened his books before the long-gathering storm burst with full fury upon the country. And it was not Patrick Henry's fiery eloquence alone that swept him into the struggle, but the step was taken after the most careful deliberation. After it had been taken there was no looking back.

It was in May, 1775, shortly after the battle of Lexington, and when he was not yet twenty, that Marshall set out from his father's house to walk ten miles to a muster, and to inform the militia there assembled of his determination to cast in his lot with that of the patriots.[1] His appearance at this time is described with great particularity. Six feet in height, straight and inclined to be slender, the black hair and dark eyes proclaimed his Celtic extraction, while a plain blue hunting shirt and trousers of rough material, fringed with

[1] Marshall's father early entered the American army, and subsequently rose to the rank of colonel. He served with conspicuous gallantry at Germantown, Brandywine, and Monmouth. After the war he removed to Kentucky.

white, a round black hat ornamented with a bucktail cockade, bespoke the pioneer, the hardy yeoman, the type that was destined to cut the apron strings that menaced the colonial mind of the coast and to win for the human race the American empire. It is beside our purpose to trace minutely the six years' career of Marshall the soldier. Entering a company which at once elected him lieutenant, his regiment was made up of volunteers from Culpeper, Orange, and Fauquier Counties. In 1777 his regiment of militia entered Washington's continental army and Marshall was promoted to a captaincy. He saw service at Brandywine, Germantown, Monmouth, and other points. He also shared the awful privations of Valley Forge. It was while in Pennsylvania that Washington appointed him Assistant Judge Advocate and he was frequently employed in the settlement of various army disputes. Such, however, was not only the beginning of his labors as judge, but his contact with Washington ripened into an intimacy which bore much fruit. Washington confided in him more and more, and on the death of Washington Marshall was intrusted by his family with the duty of writing his biography.[1]

Lieut. Philip Slaughter, who was with Marshall at this time, wrote of him as follows:

> He was the best-tempered man I ever knew, and during our sufferings at Valley Forge nothing discouraged, nothing disturbed him. If he had only bread to eat, it was just as well; if only meat, it made no difference. If any of the officers murmured at their deprivations, he would shame them by good-natured raillery, or encourage them by his own exuberance of spirits.[2]

Marshall's military experience was, in many respects, a university training for him. It not only removed him from his backwoods Virginia home and broadened his vision by contact with educated persons; but to meet men from vari-

[1] The heavy five volumes of Marshall's "Washington," are rarely read nowadays, but they contain a mine of material. His long Introduction was subsequently published as a separate work on the English colonies in America. Both works were translated into several languages.

[2] Justice Mitchell's Address, *Public Ledger* (Philadelphia), February 5, 1901.

ous parts of the country, to discuss the questions of the day, to fight for a cause all brave men had at heart, and to be trusted by Washington, constituted a training which could scarcely fail to influence an ardent, affectionate, sincere young soul. In Marshall it worked a transformation. As he himself is said to have declared, he entered the army "a Virginian; he left it an American." A weak government like that which existed under the Articles of Confederation possessed no charms for the young officer who in hunger and rags, on the desolate hills of Pennsylvania, had tasted the bitter fruit of separation, and there can be no doubt that Marshall's lifelong convictions respecting the scope of the constitution were almost entirely due to his recognition of the failure of the loose government of Congress during the war.

It was shortly before his withdrawal from the army, in 1781, and while endeavoring to raise a new regiment, that he attended the only lectures he ever heard. These constituted the law course given by Chancellor Wythe at William and Mary College, Williamsburg, toward the end of 1780. The ensuing year Marshall was admitted to the bar, and, having resigned his commission in the army, began the practice of his chosen profession in Fauquier County. The opportunities for litigation were innumerable, for a great war, followed by a change of government, had been accompanied by many social and economic changes; and out of a chaotic state of things American jurisprudence was to be created. Of all the commonwealths of the Union, moreover, Virginia was by far the best adapted, by reason of its judicial and political system, to train Marshall for his future career. Fortune smiled on him, moreover, from the start, and on January 3, 1783, he was married to a young Virginian girl, Mary Willis Ambler, whose father, Jacqueline Ambler, was treasurer of the State. Of this long and happy union, which was terminated by the death[1] of Mrs. Marshall nearly half a century

[1] Both Marshall and his wife are buried in Old Shockhoe Hill Cemetery, Virginia, and their graves are side by side. Marshall wrote the short in-

later, there are countless descriptions written by Binney, Rawle, and others of his eulogists. Meanwhile he had entered public life in 1782 by becoming a member of the State Legislature from Fauquier County, and such was the confidence he inspired that he was reëlected to the position two years later. It was now that his lucrative practice caused him to remove to Richmond, whose bar at that time was perhaps the foremost in the country. Such was Marshall's talents, however, that he soon become a leader there, and in spite of his wishes we find him elected in 1786, and in succeeding years, until 1792, to the State Legislature from Henrico County. He also became a member of the Virginia Council of State and brigadier general in the militia, and this latter title was often given him even after he became Chief Justice.

It would be too much to claim that Marshall accomplished a great deal during his ten years' membership in the Legislature of Virginia. The State was far from being a wealthy one at that time, and the opportunities for statesmanship were not frequent. It must be remembered, moreover, that, despite his frequent appearance in public life, Marshall never sought office. Indeed, few men declined more unsought honors. At the same time Virginia's influence was then well-nigh supreme, and he was enabled to meet all the leading men of the period. And in those days of slow communication and crude journalism, personal acquaintance meant everything. What most puzzles the average student of this portion of Marshall's life, however, is to account for the manner in which he mastered legal principles.[1] As we have seen already, his early education was imperfect. In a busy, active, political life how did he contrive to overcome the drawbacks of his youth? Granted that he was not a learned jurist in the strict meaning of the term, and that his

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scription on his wife's tomb which concludes with these words: "This stone is devoted to her memory by him who best knew her worth and most deplores her loss." (Baltimore *Sun*, February 4, 1901.)

[1] Wayne MacVeagh's address. (The *Post* and the *Evening Star* (Washington), February 5 and 4, 1901.)

decisions are often barren of precedents and citations, there can be no question that as a common law judge he ranks with Mansfield and Holt, and that in the field of constitutional law his luminous decisions have never been approached. To his native hard common sense, to the prophetic insight of a statesman trained in the heroic school of nation-builders, and to a mind singularly receptive to legal concepts John Marshall added a strong, wiry constitution which only his country breeding could have given him. And we may ascribe to these facts his success at the Richmond bar, his influence as Virginian legislator, and, indeed, his extraordinary eventful career from beginning to end, to say nothing of the moral strength which comes to one conscious of a trust, and no less conscious of his power to execute it.

Marshall's greatest achievement in these early years, however, was neither at the bar nor as a member of the Virginian Legislature, but as delegate to the Constitutional Convention which met at Richmond June 2, 1788, and remained in session for almost a month. This commonwealth was then the stronghold of the State Rights party, and the spirit of separation was most pronounced. At the same time the friends of the constitution recognized that without the vote of Virginia ratification was doomed. Both parties, therefore, struggled fiercely for the mastery, and sent their best men to the convention, which included among its members such names as those of James Madison, James Monroe, Patrick Henry, George Wythe, John Blair, George Mason, Benjamin Harrison, Edmund Randolph, and Paul Carrington. Marshall threw himself on the side of the federalists, and it was due largely to his and Madison's convincing arguments that the convention finally ratified the constitution. Carried by the very small majority of ten votes, the result was hailed as a victory, and made the new government possible. His replies in the convention to the objections of Henry, Mason, and others exhibit the firm grasp of the meaning of the constitution which he subsequently displayed on a far wider field, and show him also as the friend and upholder of democ-

racy, convinced that the constitution would prove its best safeguard.

The supporters of the constitution [he said in reply to some question from Henry] claim the title of being firm friends of the liberty and rights of mankind.[1] They say that they consider it as the best means of protecting liberty. We, sir, idolize democracy. Those who oppose it have bestowed eulogiums on monarchy. We prefer this system to any monarchy, because we are convinced that it has a greater tendency to secure our liberty and promote our happiness. We admire it because we think it a well-regulated democracy. . . . There are in this State, and in every State of the Union, many who are decided enemies of the Union. Reflect on the probable conduct of such men. What will they do? They will bring amendments which are local in their nature, and which they know will not be accepted. What security have we that the other States will not do the same? We are told that many in the States were violently opposed to it. They are more mindful of local interests. They will never prefer such amendments as they think would be attained. Disunion will be their object. This will be attained by the proposal of innumerable amendments.

Marshall subsequently declared that the people's affection was the best support of government. He was especially happy in his explanation of the taxing power of the new government, and repeatedly depicted the incapacity of the existing system of administration. Most of all was he at home, however, when the contest reached the point regarding the judiciary. George Mason had urged that to authorize the federal government to erect new courts would have a tendency to weaken the influence of the State tribunals. To these arguments Marshall made an extended reply, including the following language:

Mr. Chairman: This part of the plan before us is a great improvement on that system from which we are now departing. Here are tribunals appointed for *the decision of controversies* which were before either not at all, or were improperly provided for. That many benefits will result from this to the members of the collective society, every one confesses. Unless its organization be defective, and so constructed as to injure instead of accommodating the convenience of the people, it merits our approbation. After such a candid and fair discussion by the gentlemen who support it—after the very able manner in which they have investigated and examined it—I conceive it would be no longer considered as so very defective, and that those who opposed it would be convinced of the impropriety of some of their objections. Gentlemen have gone on the idea that the federal courts will not determine the causes which may come before them with the

[1] 3 Elliott's Debates, 222.

same fairness and impartiality with which other courts decide. What are the reasons of this supposition? Do they draw them from the manner in which the judges are chosen, or the tenure of their office? What is it that makes us trust our judges? Their independence in office and manner of appointment. Are not the judges of the federal courts chosen with as much wisdom as the judges of the State governments? Are they not equally, if not more independent? If so, shall we not conclude that they will decide with equal impartiality and candor? If there be as much wisdom and knowledge in the United States as in a particular State, shall we conclude that the wisdom and knowledge will not be equally exercised in the selection of judges?[1]

After having shown the benefits of the judiciary, Marshall unfolded the various other advantages of the constitution. He dwelt at considerable length on the subject of the militia. Economy and industry, he said, are essential to America's happiness; but "the present government will not add to our industry. Indeed," he added, "it takes away the incitements to industry by rendering property insecure and unprotected. It is the paper on your table that will promote and encourage industry."[2]

As stated already, Marshall remained in the Legislature until 1792, with a reputation vastly enhanced by reason of his display of learning in the Constitutional Convention. The next three years are devoted to his lucrative practice. In 1795, we find him, against his inclinations, once more in the State Assembly. Honors now come thick and fast. Washington offers him the vacant attorney-generalship, which he declines; and on the recall of Monroe from France he is tendered the ministry to that writhing country, but he will not accept it. Meanwhile the countrymen of Lafayette become more overbearing, and go so far as to refuse to receive Charles Cotesworth Pinckney, the Minister accredited to them by our government, and we find that John Marshall, Charles Cotesworth Pinckney, and Francis Dana were appointed special envoys to France to bring about a better understanding between the two countries. Dana having declined the honor, Elbridge Gerry, a New England democrat, was sent in his place as an offset to the two

[1] 3 Elliott's Debates, 552. [2] Ibid., 231.

Southern federalists. As all the world knows, this "X, Y, Z" mission, as it was called because of the blackmailing anonymous letters sent the American Commission by Talleyrand and other representatives, failed utterly; but Marshall's dignified correspondence with the French politicians added greatly to the prestige of America, and on his return home he met with the most cordial reception.[1] His fame was now national. Meanwhile to the trip abroad may be assigned that knowledge of "world politics" and profound mastery of international law for which Marshall was famous. Indeed, he decided as many international law cases as cases in the field of constitutional law. He had already displayed his diplomatic knowledge by advocating, in 1795, the adoption of Jay's treaty, which, bad as it unquestionably was, established the principle that the executive may enter into a commercial convention. Visiting Europe, moreover, at a time when the struggle between the ideas of the French Revolution and those of the Middle Ages was threatening the peace of the entire world, he became doubtless more conservative than ever, and perhaps even more distrustful of the Jacobin tendencies of Jefferson. At all events, the impressions made on him by European affairs influenced him in no small degree, as is evident from three letters written to George Washington. Writing from The Hague, September 15, 1797, he says:

> By the ships of war which met us we were three times visited, and the conduct of those who come on board was such as would proceed from general orders to pursue a system calculated to conciliate America.[2] Whether this be occasioned by a sense of justice and the obligations of good faith, or solely by the hopes that the perfect contrast which it exhibits to the conduct of France may excite keener sensations at that conduct, its effects on our commerce are the same.

Later on he reaches Paris, and writes to Washington from that city a letter under date of October 24, 1797. In this communication he expresses grave doubts about the recep-

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[1] Pinckney's toast, "Millions for defense, but not a cent for tribute," became the rallying cry of the federalists.

[2] *American Historical Review*, Vol. II., pp. 294, 295.

tion of the envoys.[1] They had already begun to prepare to leave for home. He complains bitterly of the French depredations, and declares that

The captures of her vessels seem to be limited only by the ability to capture. That ability is increasing, as the government has let out to hardy adventurers the national frigates. Among those who plunder us, who are most active in this infamous business, and most loud in vociferating criminations equally absurd and untrue, are some unprincipled apostates who were born in America. These sea rovers by a variety of means seem to have acquired great influence in the government. This influence will be exerted to prevent any accommodation between the United States and France, to prevent any regulations which may intercept the passage of the spoils they have made on our commerce, to their pockets. The government, I believe, is but too well-disposed to promote their views. At present it seems to me to be radically hostile to our country. . . . Might I be permitted to hazard an opinion, it would be that the Atlantic only can save us, and that no consideration will be sufficiently powerful to check the extremities to which the temper of this government will carry it, but an apprehension that we may be thrown into the arms of Britain.

The tortuous negotiations drag their length slowly along until early spring, when the disgraceful plans of the French government become too patent for further concealment.[2]

Before this reaches you, [writes Marshall] it will be known in America that scarcely a hope remains of accommodating, on principles consistent with justice, or even with the independence of our country, the differences subsisting between France and the United States. Our Ministers are not yet, and it is known to all that they will not be, recognized without a previous stipulation on their part that they will accede to the demands of France. It is well known that these demands are for money, to be used in the prosecution of the present war. It was, some little time past, expected that, convinced of the impracticability of effecting the objects of their mission, our Ministers were about to demand their passports and to return to the United Sates; but this determination, if ever made, is, I am persuaded, suspended, if not entirely relinquished. The report has been made that, so soon as it shall be known that they will not add a loan to the mass of American property already in the hands of this government, they will be ordered out of France and a nominal as well as actual war will be commenced against the United States. My opinion has always been that this depends on the state of the war with England. To that object the public attention is very much turned, and it is perhaps justly believed that on its issue is staked the independence of Europe and America.

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[1] *American Historical Review*, pp. 302, 303.

[2] Letter of Marshall to Washington, dated Paris, March 8, 1798. *American Historical Review*, Vol. II., pp. 303, 304.

Subsequent events proved that Marshall's keen eyes had penetrated only too well the thin disguise with which the French government sought to conceal its duplicity. And when at last the American people realized that a state of war existed *de facto* if not *de jure*, a reaction occurred in favor of the federalists; alien and sedition laws were forgotten, and so also were the Virginia and Kentucky Resolutions. Acting, so it is said, on the suggestion of Washington, Marshall became a candidate for a seat in Congress, and in 1799 was triumphantly elected, notwithstanding the formidable opposition of Jefferson's party. Political excitement was great, and not even Washington was spared the most vehement denunciation.

Congress met at Philadelphia December 2, 1799. Marshall's first act was formally to announce to that body the death of the "Father of His Country." Before his election to Congress Marshall had been tendered a seat on the supreme bench, which he declined to accept. Virginia at this time had eleven representatives in Congress, and from all parts of the country came men of the greatest ability to participate in the discussion of those vital questions which were ushered in with the new century. Marshall was soon recognized as one of the greatest expounders of the constitution, and, although never looked upon as an orator, he rarely failed to attract attention whenever he addressed the House. He was especially distinguished, during his brief experience as Congressman, for his clear elucidation of that threefold division of government into its legislative, judicial, and executive functions which must ever remain among America's most permanent contributions to the science of administration. This grasp of fundamental principles is especially noticeable in his celebrated speech on the case of Jonathan Robbins. Accused of murder committed on board an English ship, Robbins had escaped to the United States, and at the request of the British authorities President Adams had surrendered the fugitive. Marshall's speech was mainly instrumental in establishing the principle that the act was an executive and not a judi-

cial one.[1] In the same Congress Marshall also showed the necessity of a strong standing army and displayed an unusual knowledge of the principles of international law. His independent attitude, moreover, caused him to favor the repeal of the more obnoxious portions of the alien and sedition laws, and he took this position notwithstanding the contrary opinion of President Adams and the bulk of the Federal party. His worth was recognized, however, and the President not only tendered him a seat on the supreme bench, which Marshall refused to accept, but on May 13, 1800, appointed him Secretary of State. This position Marshall accepted, and he retained it until after Jefferson's inauguration, discharging the duties of the office even after his elevation to the bench.

It was in January, 1801, that Adams appointed Marshall to the chief justiceship, a position he assumed on February 4, following. Years afterwards Adams declared that he looked upon this appointment as "the proudest act of his life." When at the age of forty-five Marshall was installed in the office which he graced until his death, at Philadelphia, July 6, 1835, he had already earned a reputation that would have made him a striking figure on the stage of American politics. But for more than a third of a century later, and long after most of his contemporaries had entered into rest, he was destined to pursue his stately way, unmindful of popular clamor, oblivious of factional abuse and personal diatribe, a connecting link between the fading traditions of the past and the nascent glories of the future. Is it too much to claim that to this statesman-jurist we owe the fact that our constitution became something more than even its framers hoped it would become? Was it his breath that vitalized the dry bones of our fundamental law and transformed them into a living organism?

To appreciate in some measure Marshall's services on the bench, one should contrast the Supreme Court when he began his career as judge with the same tribunal when he

[1] Annals of Congress, Vol. X., pp. 596–618.

quitted the scene on his death. Created by the constitution and organized by the Judiciary Act of September 24, 1789, this body was a novel institution in the history of mankind. Composed of one chief justice and several associates whose number by subsequent legislation has been increased to eight, the enormous power of this court has attracted the attention of such foreigners as de Tocqueville, Bryce, and Freeman, and at various times it has aroused the mistaken hostility of many Americans. Appointed for life by the President, and confirmed by the Senate, the judges of the Supreme Court enjoy the greatest freedom imaginable. At the same time the constitution has defined its jurisdiction in clear terms. What has most excited the interest of transatlantic critics and even incurred the adverse criticism of those at home, who should know better, is the power conferred on the Supreme Court to declare unconstitutional any State or Federal measure which conflicts with the supreme, fundamental law of the land. But this arises necessarily from the fact that our constitution is a written instrument established for the government of a republic of republics. To interpret such a document and to interpose the veto of the people, whenever their representatives, in State or National assembly, exceed their authority, is the only means by which to safeguard popular freedom. Behold, therefore, the Supreme Court, an institution designed to watch over the interests of popular sovereignty, to preserve the relations between the States and the Nation, and to keep within their proper bounds the various departments of the government. Hence the folly of maintaining that the Supreme Court overrides all other branches of the government, for, after all, it represents only a coördinate department and is itself subject to the constitution. But it is more independent than any other court in history.

Some idea of the work of this court may be gained by an examination of the following table illustrative of the nature of the cases involving points of constitutional law which Marshall and his associates were called upon to decide:

I. Legislative Powers Conferred on Congress.
II. The Houses of Congress.
III. The Executive Power and the Mode of Its Exercise.
IV. The Judicial Power.
V. Public Acts, including Records and Judicial Proceedings.
VI. Fugitives from Justice, and Persons Bound to Service.
VI. Territory and Public Property of the United States.
VII. *Ex Post Facto* Laws.
VIII. Direct Taxes.
IX. Laws Impairing Obligations of Contracts.
X. Retrospective Laws.
XI. Insolvency and Bankrupt Laws.
XII. Imposition of Duties. Foreign and Interstate Commerce.
XIII. Laws of States Which Are or Are Not in Conflict with a Treaty or Law of the United States or in Derogation of Some Provision of the Federal Constitution.
XIV. Laws of the Several States in Reference to Their Constitutions.
XV. Powers of States Not Controlled by the Constitution, Treaties, or Laws of the United States.
XVI. Bills of Credit.

The difference between a written constitution and one that is unwritten is thus obvious. One may also perceive why the Supreme Court of the United States may declare even an act of Congress inoperative, while no such test can be applied to parliamentary enactments. It was Marshall who developed this principle.[1] We say that he developed this principle not only in view of his vast number of decisions, but also because of the slight importance his predecessors appear to have attached to the office. John Jay, the first chief justice, saw no impropriety in accepting the mission to England, and embroiling himself in the turmoil growing out of the treaty which bears his name. Indeed, he resigned the justiceship eventually to become Governor of New York, a step no Federal chief justice would now dream of taking. John Rutledge, of South Carolina, who was nominated to succeed Jay, had so vehemently opposed Jay's treaty that a Federal Senate refused to confirm the appointment, and when the name of William Cushing, of Massachusetts, then associate justice of the United States Supreme Court, was sent in, it was at once confirmed by the Senate, but he preferred the position he then enjoyed to

[1] Senator Lodge, in *North American Review*, February, 1901, pp. 191–194.

that of chief justice, and declined to accept. Finally Oliver Ellsworth, of Connecticut, was duly appointed chief justice, who retained the position until his resignation, late in 1800, while visiting Europe. It was the vacancy thus caused that resulted in Marshall's appointment.

When Marshall became chief justice the Supreme Court was scarcely a dozen years old, and in that period it had decided less than a hundred cases, comparatively few of which were on constitutional law. They might all have been included in an ordinary-sized volume. It is well to remember, however, several facts connected with our history at that time. In the first place, the Federal party was in full control of the government, and Washington's enormous influence was on its side. It required, therefore, some mighty political upheaval, like that of 1800, to test the principles of the written constitution and call forth the judicial exegesis which rendered Marshall so famous. Nor should it be forgotten that the inhabitants of the country were then few in point of numbers, that they were busily repairing fortunes blasted by a long and desolating war, that intercommunication was slow and expensive, and that the age of political organization had not yet arrived. The judgments rendered by the Supreme Court while he was chief justice fill more than thirty volumes, and in most of these Marshall rendered a decision.[1] But it would be an error to fancy that even the majority of these cases involved points of constitutional law. A host of them arose out of the ordinary jurisdiction conferred upon the Federal courts, including questions relating to the law of nations, a prolific source of litigation during the troublous years of the Napoleonic epoch, and, in point of fact, only about fifty-one cases were decided in the field of constitutional law. But the decisions of thirty-four of these cases Marshall himself prepared in that luminous, logical style for which he is so justly celebrated, and it is said that in one case only did he find him-

[1] Justice Story, in 1839, published a work entitled "The Writings of John Marshall, late Chief Justice of the United States," which contains his interpretations of the constitution.

self in a minority. It is impossible to enumerate these landmarks in the history of our jurisprudence, but a brief mention of some of these cases may go far toward illustrating Marshall's genius as interpreter of a written instrument. It may also serve another purpose—namely, that of portraying the manner in which there was imparted to that instrument a unity and elasticity approaching that of an unwritten constitution.

One of the greatest cases brought before Marshall was that entitled "Marbury vs. Madison,"[1] which was decided in 1803, more than two years after his elevation to the bench. The position he then took, and ever afterwards consistently maintained, increased the feeling of hostility between himself and Jefferson. The facts in the case are simple enough. William Marbury, Robert T. Hooe, Dennis Ramsay, and William Harper had been appointed by President Adams justices of the peace for the District of Columbia, under an act of Congress dividing the District into two counties, and conferring original jurisdiction on the Supreme Court in certain cases. Marbury accordingly applied to the Supreme Court for a writ of *mandamus* to compel James Madison, then Secretary of State, to issue the commission to which he was entitled. In rendering his decision in the case Marshall laid down the principle that Congress had no power to confer original jurisdiction on the Supreme Court, a tribunal established by the constitution, and that any act of Congress repugnant to the constitution is not law. It is scarcely too much to say that this decision not only raised the judiciary of the nation to its proper rank, but established the principle that the constitution of the United States is the supreme law of the land. In other words, it was Marshall's view in Marbury vs. Madison that demonstrated the fact that the fundamental law of this country is the work of the people themselves, that their agents or representatives cannot alter it, and that the umpire to decide such disputes is the Supreme Court.

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[1] 1 Cranch, 137.

Marbury vs. Madison was followed shortly afterwards by several other cases of scarcely less magnitude in importance. Without reference either to chronology or subject, these may now briefly be mentioned. In Fletcher vs. Peck[1] it was held that the Supreme Court may pronounce an act of a State Legislature void when it is in conflict with the federal constitution. At the February term, 1812, in New Jersey vs. Wilson,[2] came a formal decision to the effect that a Legislative act passed in consideration of a release of title by the Indians, declaring that certain lands which should be purchased by the Indians should be free from taxation, constituted a contract, which could not be rescinded by a subsequent legislative act. That is to say, a repealing act made under the circumstances just indicated was void under that clause of the federal constitution which prohibits a State from passing any law impairing the obligation of a contract. The same doctrine was elaborately reiterated in 1819, when Marshall handed down his decision in the celebrated case of the Trustees of Dartmouth College vs. Woodward,[3] which has safeguarded corporate rights and vested interests generally during more than one period of social reaction. Compendiously stated, the facts in this case are as follows: The English king, during the colonial epoch, had granted a charter to Dartmouth's trustees and conferred upon them certain franchises. These the Legislature of New Hampshire subsequently altered, but the Supreme Court declared that the charter of a private corporation is a contract between it and the State, and therefore protected by that clause of the constitution which inhibits a commonwealth from passing any law impairing the obligation of a contract. It was in this decision that Marshall gave his classic definition of a corporation. He called it an invisible, intangible being existing only in contemplation of law. From the point of view of those interested in tracing the historical development of our written constitution those decisions of Marshall which pertain to the relations between the States and the Nation are

[1] 6 Cranch, 87. [2] 7 Cranch, 164. [3] 4 Wheaton, 518.

naturally the most attractive. Of these several have already been mentioned. Two or three others will now be briefly indicated, and of these the most important, perhaps, is that of the United States vs. Peters, wherein was formulated the doctrine that the judgments of the federal courts are protected from State interference; Cohens vs. Virginia decided that cases involving "federal questions" may be brought to the Supreme Court from the tribunals of highest appellate jurisdiction in the States, while Sturges vs. Crowninshield authoritatively prohibited a State from passing insolvent statutes releasing debts incurred prior to its enactment. To these one may add Wilson vs. Mason,[1] wherein it was held that a compact between two States cannot infringe upon the constitutional rights of Congress.

One of Marshall's most historic decisions was that rendered in the great case of McCulloch vs. Maryland.[2] It was a distinct victory for the federalists, for it not only declared the constitutionality of the act creating the Bank of the United States,[3] but it also did much to curtail the power of State Legislatures. Had a State possessed the right to tax a fiscal agent of the national government, as Maryland virtually attempted in imposing such a tax on the branch of the bank, the constitution would, indeed, have been "a rope of sand." Already, in the United States vs. Fisher,[4] it had been held that the right to make all laws necessary and proper to carry into execution the powers granted Congress confers on that body a choice of means and does not confine it to what is indispensably necessary.

Before dismissing the subject of the great struggle over the subject of the bank, attention may be drawn to the decision rendered in Osborn vs. United States Bank.[5] Here Marshall declared that the charter of the bank authorized it to sue in any circuit court of the United States, and that a State law im-

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[1] 1 Cranch, 45.
[2] 4 Wheaton, 316.
[3] 3 Stat. at Large, 266.
[4] 2 Cranch, 258.
[5] 9 Wheaton, 738.

posing a tax on one of the branches of the bank was unconstitutional and void.

Viewed from one point, the cases which grew out of Georgia's treatment of the Cherokees occasioned more popular excitement than any referred to the Supreme Court while Marshall was its presiding genius. Not only was the status of the Indian tribes fixed in the two cases of the Cherokee Nation vs. Georgia[1] and Worcester vs. Georgia,[2] but the dependence of the aborigines upon the government at Washington was definitely laid down. Scarcely less interesting is the second of these cases. Just now it has peculiar significance, as it sets forth, in clearest terms, the rights of missionaries. At the time of the arrest and imprisonment of Worcester and others, who had gone to preach the gospel to the Cherokees, both the secular and religious press contained long accounts of the extraordinary conduct of the Georgia authorities, particularly that of some officers of the militia. Georgia's defiant attitude in these cases, and President Jackson's lukewarm support of the court, contributed much to the growth of the Nullification party in South Carolina. But notwithstanding the passionate outburst of opposition to the court, Marshall was unmoved. It is extremely unfortunate that the tariff act did not pass under his review.

Before finishing this incomplete review of some of Marshall's leading cases on constitutional law it may not be out of place to refer to a case in a field which has since been developed by the growth of railways and other inventions of an industrial age which was just dawning when Marshall finished his labors. We refer to those questions which have arisen out of the clause of the constitution that confers upon Congress the power to regulate foreign and interstate commerce. In the important case of Gibbons vs. Ogden,[3] decided by the Supreme Court more than seventy-five years ago, Marshall construed this power and in reviewing a statute passed by the Legislature of New York giving to Fulton and others exclusive rights over the Hudson river, he held

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[1] 5 Peters, 1. [2] 6 Peters, 515. [3] 6 Wheaton, 448.

that the right to control commerce includes the power to regulate navigation, and does not stop at the external boundaries of a State. This power, he added, does not comprehend commerce which is completely internal. A somewhat similar doctrine was enunciated in the subsequent case of Brown vs. Maryland.[1] The State of Maryland having enacted a law requiring importers to pay a license before they could sell a package of imported goods, it was held that the statute not only contravened the provisions of the constitution which prohibited the States from imposing duties on importations, but also the clause giving Congress control over interstate commerce. It must not be assumed, however, that Marshall approached these questions lightly. In Ogden vs. Saunders,[2] where an act of the Legislature of New York was pronounced unconstitutional, he solemnly declared, "this Court has so often expressed the sentiments of profound and respectful reverence," with which it approaches such questions that it is now unnecessary to do so again.

One case more, and we have finished this portion of our paper. It was Owings vs. Speedwell,[3] which authoritatively determined that the present constitution did not go into effect, or rather commence to operate, until the first Wednesday in March, 1789.

The space at our command will not permit us to follow Marshall into Virginia and North Carolina, where he so often went, while Supreme Court Justice, to try causes on the circuits and where so many anecdotes[4] illustrative of his character still linger in the traditions of the people. One case he tried at Richmond must, of course, forever remain a part of our national history. His lack of confidence in Jefferson had almost caused him to cast his vote for Aaron Burr in 1800, when the election of President devolved upon Congress, but he was fortunately dissuaded from this false step. Nevertheless, when Burr was indicted for treason in 1807,

[1] 12 Wheaton, 419.
[2] Ibid., 213.
[3] 5 Wheaton, 420.
[4] Niles's Register, 55–117.

and Marshall presided at the trial, his Federal bias—the accused having meanwhile joined Marshall's party—added to the irritation produced on his mind by Jefferson's undignified course toward Burr, caused Marshall to lean strongly toward the adventurer. At the same time few will now doubt that his doctrine of the crime of treason is the only one that can be extracted from the clause of the constitution[1] defining that offense. Marshall's efforts, however, to subpœna Jefferson, the President, and compel his appearance in court, were wholly unwarranted and, in view of his wonderful common sense, well-nigh unintelligible. It is an incident no admirer of the "great chief justice" wishes to remember.

In concluding this very imperfect sketch of one of the greatest figures that has appeared in our history, a figure which has never received proper attention from those who have narrated the birth and growth of the American republic, something should be said of his career as a man. Of his beautiful domestic life mention has already been made. A passing allusion has also been made to his deep religious convictions, and Bishop Meade has recorded Marshall's regular attendance at Church whether he was in the country or at Richmond. Thanks to the brushes of Inman, Saint Mémin, Sully, Harding, and others, not to mention the statue of Story in front of the capitol at Washington, we have also preserved for us in enduring form the features of the chief justice.[2]

From all available descriptions, Marshall, in personal appearance, was tall and thin, his movements slow and deliberate, and in his later years he stooped somewhat. Wirt thought his manners far removed from those extolled by Chesterfield, but Randolph had a different impression and is reported to have said that "the manner of Marshall is perfect

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[1] Art. III., Sec. 3.

[2] Of these portraits, Inman's belongs to the Philadelphia bar; that of Saint Mémin, to a descendant of Marshall who resides in Baltimore; while Sully's hangs in the Corcoran Gallery at Washington. Other paintings are in Richmond and Boston. James M. Barnard, Esq., of Milton, Mass., last winter generously sent copies of the first to all the law schools in the United States.

good breeding." All accounts agree in depicting him as a man of unusual simplicity, free from affectation of all kinds, and possessed of those genial, sweet-tempered qualities of mind and heart which form the basis of true courtesy. And it was these rare and gracious attributes that endeared him to his neighbors and inspired confidence and affection even among those who differed from him politically. One who saw much of him in the winter of 1822–23, when Marshall was verging on three score and ten, has left this pen picture of his manners and appearance:

> To me his manners seemed to be, indeed, perfect; they were full of refinement and courtesy, but it was the refinement which sprang from and indicated the absolute absence of everything like vulgarity of taste, feeling, or thought; and his courtesy was the natural expression, equally unrestrained and unaffected, of his gentleness and benevolence. He wore upon his face a perpetual smile, but it was the farthest possible thing from a simper. . . . To his dress he was utterly inattentive. His garments were old and old-fashioned, of coarser material than was then commonly worn, and hung loosely about him. No one could forget his coat, large enough for a man twice his size, with vast pockets in the skirts, in which he could stuff quantities of papers, without infrequently a law book in each.[1]

Although Marshall's opinions aroused frequent opposition, few ever questioned his integrity. Some politicians asserted that when the chief justice decided the case of McCulloch vs. Maryland he owned stock in the bank; but it was soon demonstrated, to all who had lent willing ears to so false a statement, that the seventeen shares that had once been in Marshall's name were for the benefit of some wards of his, and that the stock had been disposed of, with careful foresight, long before the chief justice heard arguments in the case. Ever careful to abstain from political controversy, he was occasionally drawn into the newspaper disputes of that period. But he never shrank from expressing his opinions, even on political topics, when he thought it his duty to do so, or evaded those civic obligations from which no one is free.

It was this sensibility to the duties of a citizen which caused him, in his old age, to become a member of the convention of 1829 which brought about the revolution in the constitu-

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[1] *American Law Review*, Vol. I., pp. 434, 435.

tion of Virginia. While not unmindful of the need of reform in some directions, he threw the weight of his enormous influence against those efforts at innovation that were directed against the independence of the judiciary. He was opposed to a political judgeship. In a speech delivered before the convention December 11, 1829, he has given us his own conceptions of the duties of a judge in these words:

> He has to pass between the government and the man whom the government is prosecuting, between the most powerful individual in the community and the poorest and most unpopular. It is of the last importance that, in the exercise of these duties, he should observe the utmost fairness. The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered properly and completely independent, with nothing to influence or control him but God and his conscience? You do not allow a man to perform the duties of a juryman or a judge if he has one dollar of interest in the matter to be decided, and will you allow a judge to give a decision when his office may depend upon it, when his decisions may offend a powerful and influential man?[1]

In the same convention Marshall also spoke in favor of the compromise by which it was sought to reconcile the conflicting interests of those counties where slaves were numerous with those where they were few in number.[2] Curiously enough, the same question that had caused so many disputes between the North and the South in the federal convention—namely, that of the representation of the slaves—arose in more than one Southern State!

His conservative tendencies again crop out in two letters, written at about this time. The first of these was written from Richmond, January 1, 1828, and it is addressed to Alexander Smith at Washington. It grew out of the discussion provoked by the unfortunate incidents connected with the presidential election, and Marshall expresses himself regarding certain arguments which had been urged against the re-eligibility of the President, concluding by saying: "Though not very fond of experiments, I should be disposed to try the effect of confining the chief magistrate to a single term."[3]

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[1] 37 Niles's Register, pp. 302, 303.

[2] Ibid., 289, 290.

[3] 35 Niles's Register, 315.

The other letter just referred to is one written February 22, 1835, to Elliott Carson, who had extended him an invitation to attend a meeting of the Young Men's Colonization Society of Pennsylvania. Unable to attend, Marshall expresses his regrets, and at the same time indicates his opinion, not only of Mr. Carson's Society, but also of the rising spirit of the abolition movement. The space at our command will not admit of the reproduction of the entire letter, but the following excerpt will serve to illustrate the feelings of Marshall, himself a slaveholder, on a question then ever assuming graver aspects. Referring to the Colonization Society, he says: "I look with interest at the effective measures they have taken, and are taking, to accomplish an object which ought to be dear to every American born, and particularly so to our fellow-citizens of the South. I hope their judicious zeal will go far in counteracting the malignant effects of the insane fanaticism of all those who defeat all practicable good, by the pursuit of an unattainable object."[1]

Before finishing with the subject of Marshall's political views while chief justice, one more allusion ought to be made to his opinion of the groundless charges brought against John Quincy Adams and Henry Clay, and immortalized by John Randolph's accusation of a corrupt bargain between "puritan and blackleg." In a communication written the Richmond *Whig*,[2] March 29, 1828, he explains that his position had caused him to abstain from any public comments on the election. He then denies certain statements attributed to him, but admits having said in private that "though I had not voted since the establishment of the general ticket system, and had believed that I never should vote during its continuance, I might probably depart from my resolution in this instance, for the strong sense I felt of the injustice of the charge of corruption against the President and Secretary of State."

On Marshall's death, at Philadelphia, while visiting that city in search of health, his remains were sent to Richmond

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[1] 48 Niles's Register, 162. [2] 34 Niles's Register, 108.

in charge of a committee of the bar consisting of John Sergeant, Richard Peters, E. D. Ingraham, and Wm. Rawle. Gen. Winfield Scott, of the army, accompanied the funeral party, while public meetings all over the country gave expression to the universal sorrow occasioned by his demise. Here and there, amid the chorus of eulogy, came a discordant note. But even in one of the most jarring of these—namely, that which appeared in the New York *Evening Post*—there was added to the joy expressed, "that he is at length removed from that station," the gentle words "at the same time we entertain a proper sentiment for the death of a good and exemplary man."[1] In spite of contemporary hostility, however, posterity has sustained the verdict of Justice Story, Marshall's Republican associate on the bench for almost a quarter of a century, who on the death of the chief justice exclaimed: "I confess myself unable to find language sufficiently expressive of my admiration and reverence of his transcendent genius."[2]

B. J. RAMAGE.

[1] 48 Niles's Register, 341. [2] 49 Niles's Register, 171.